Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

SAMUEL A. LEWIS,
Former Director, Arizona Department of Corrections,

Petitioner,

v.

LESLIE ANDREW HANLON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
Attorney General

C. TIM DELANEY
Solicitor General

THOMAS J. DENNIS
Counsel of Record
GORDON S. BUELER
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-7683
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is the former Director of the Arizona Department of Corrections entitled to qualified immunity from a suit for money damages filed by an ex-inmate alleging a violation of the Ex Post Facto Clause based on the application of a formal "good-time" release policy promulgated after the inmate's conviction, which prevented his early release from prison due to a high risk classification, when (i) Arizona law existing when the inmate's crime was committed made "good-time" release completely discretionary with ADOC's Director, (ii) the Arizona Court of Appeals previously declared that the application of the formal policy did not violate Ex Post Facto principles, and (iii) the promulgation of the formal policy did not violate the Ex Post Facto Clause because it did not add to the inmate's sentence?

PARTIES TO THE PROCEEDING BELOW

Petitioner is Samuel A. Lewis, who was the Director of the Arizona Department of Corrections at all relevant times to this proceeding but who has since retired.

The Respondent is Leslie Andrew Hanlon, a former Arizona state prison inmate.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The court of appeals opinion is not reported. Appendix ("App.") A. The judgments of the United States District Court for the District of Arizona also are not reported. Apps. B and C.

STATEMENT OF JURISDICTION

On July 25, 1996, the court of appeals entered the judgment from which review is sought. App. A. On September 6, 1996, the court denied rehearing. App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the Ex Post Facto Clause of the United States Constitution, art. I, § 9, cl. 3, provides as follows:

> No Bill of Attainder or Ex Post Facto Law shall be passed.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent text of Arizona Revised Statutes Annotated ("A.R.S.") § 41-1604.07 is reproduced in Appendix E.

STATEMENT OF THE CASE

In 1986, the Arizona Legislature enacted A.R.S. § 41-1604.07(D), which gave the Director of the Arizona Department of Corrections ("ADOC") discretion to allow the early release of inmates in some circumstances:

> [ADOC's] director, according to rules promulgated by the department, *may* authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date.

(Emphasis added.) By necessary implication, the statute also granted the Director the discretion to deny early release of an inmate. Additionally, A.R.S. § 41-1604.07(B) changed prior law by providing that release credits

earned by a prisoner "shall not reduce the term of imprisonment imposed by the court."

On January 28, 1988, Respondent committed the crime of extortion of a federal agency, for which he was later sentenced to 5.25 years incarceration. While incarcerated with ADOC, Respondent earned release credits (or "good-time") pursuant to A.R.S. § 41-1604.07(A).

On May 1, 1991, pursuant to the authority given by A.R.S. § 41-1604.07(D), ADOC promulgated Director's Management Order ("DMO") 91-03, entitled "Earned Release Date." The DMO set formal guidelines for earned credit release, based in part on an inmate's risk scores. ADOC used a classification system based upon public risk scores ("P" scores) and institutional risk scores ("I" scores). These scores are graded from 1 to 5, with 5 being the highest risk score possible. Section 5.2.2 of the DMO made inmates with high classification scores ineligible for earned credit release:

> The following categories of inmates shall be ineligible for Earned Release Credit Date Release . . . . Inmates with Public Risk Scores of 4 or above or an Institutional Risk Score of 5 as a result of the institutional classification and Central Office Classification Review.

DMO § 5.2.2.; App. F at 38.

ADOC applied the new DMO 91-03 to many inmates. One challenged the DMO as violative of the Ex Post Facto Clause, but the Arizona Court of Appeals in *Sanchez v. Ryan*, 870 P.2d 1184 (Ariz. App. 1993), ruled that the application of the DMO to inmates sentenced prior to its promulgation did not violate the Ex Post Facto Clauses

found in the United States Constitution or in Arizona's Constitution. The Arizona Supreme Court declined to review the *Sanchez* decision. *Id.*

On August 19, 1991, ADOC denied the Respondent earned credit release because his classification scores were too high for release under DMO 91-03. App. C at 20. While still incarcerated, Respondent filed a habeas corpus complaint in the federal district court, which was stayed because Respondent had failed to pursue state court remedies. ADOC released Respondent when his full sentence expired on April 29, 1993. *Id.* After his release, Respondent filed an Amended Complaint, dismissing his claim for habeas relief and alleging a 42 U.S.C. § 1983 action for violation of the United States Constitution's Ex Post Facto Clause.

Petitioner moved for summary judgment on the basis of qualified immunity, pointing out that in *Sanchez*, the Arizona Court of Appeals had already upheld the constitutionality of Petitioner's application of the DMO to inmates sentenced prior to the creation of the DMO. However, the district court disagreed with the Arizona Court of Appeals decision in *Sanchez* and, on March 24, 1995, rejected qualified immunity. App. B.

Petitioner appealed. In a memorandum decision, the Ninth Circuit Court of Appeals upheld the district court's denial of qualified immunity for ADOC's former Director. The Ninth Circuit summarily dismissed the Arizona Court of Appeals prior determination that the DMO did not violate Ex Post Facto principles, stating: "[T]hat a court joined Lewis in his obvious error, does not convert the disregard of existing law into a reasonable mistake.

Lewis is not entitled to qualified immunity simply by relying on a state ruling that failed to consider controlling precedent." App. A at 8. In short, the Ninth Circuit Court of Appeals held that in order to avoid paying compensatory and punitive damages, Petitioner needed to know the complex area of Ex Post Facto law better than the Arizona appellate judges who had considered the issue and determined that there was no violation.

REASONS TO GRANT THE PETITION

1. A Conflict Exists in the Circuit Courts Regarding Whether Prior State Court Decisions "Clearly Establish Law" for Qualified Immunity Purposes.

The court of appeals' denied qualified immunity even though it had been clearly established by the Arizona Court of Appeals in *Sanchez v. Ryan*, 870 P.2d 1184 (Ariz. App. 1993) that there was no constitutional violation. The Ninth Circuit's decision is directly contradicted by the decision of the Second Circuit Court of Appeals' in *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995). *Allen* involved a New York Department of Corrections policy forbidding inmates from receiving newspapers and other publications from anyone other than the publisher. The plaintiff, a New York inmate, received newspaper clippings from his family that violated the "publishers-only" policy, and he sued for money damages when the clippings were confiscated.

Prior to the suit in *Allen*, another inmate had challenged New York's "publishers-only" policy in state court as violative of the First Amendment, but the New York

Appellate Division upheld the policy in *Montgomery v. Coughlin*, 605 N.Y.S.2d 569, 194 A.D.2d 264 (N.Y.App.Div. 1993). In *Allen*, the Second Circuit rejected the opinion of the New York state court and found that the "publishers-only" directive violated the First Amendment. *Allen*, 64 F.3d at 81. However, the Second Circuit ruled that prison officials were entitled to qualified immunity on the inmate's claim for money damages because "the (state) appellate division upheld the publishers-only rule with regard to clippings in *Montgomery*, and we cannot say that appellees should have been more prescient in anticipating our reaction." *Id.*

Thus, under *Allen*, if a public official acts consistently with a state court's previous decision on an issue the state official is entitled to qualified immunity notwithstanding the fact that the federal court disagreed with and overruled the state court's decision. However, *Allen* directly conflicts with the decision rendered below. In both cases, a prior state court decision had upheld the constitutionality of a state correctional policy. In both cases, federal courts had disagreed with the decisions rendered by the state courts, finding that the policies were unconstitutional. However, in *Allen* the Second Circuit ruled that the prior state court decision entitled public officials to qualified immunity. Here, the Ninth Circuit found the prior state court decision of no effect for qualified immunity purposes.

The decision in the present case is directly contrary to the Second Circuit decision. As such, the matter of how much weight to accord prior state court rulings in cases involving qualified immunity should be finally resolved by this Court.

2. The Decision Below Denying Defendant Qualified Immunity Conflicts with This Court's Precedent That Qualified Immunity Protects Governmental Officials Except Those Plainly Incompetent or Acting in Knowing Violation of the Law.

Qualified immunity shields governmental officials from liability for civil damages when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court's precedent specifically mandates qualified immunity for public officials making "judgment calls" in situations exactly like those presented in this case. *Id.* at 806. "Qualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment." *Ryder v. United States*, 115 S. Ct. 2031, 2037 (1995). Making the scope of immunity absolutely clear, this Court has ruled that qualified immunity attaches to "all but the plainly incompetent and those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

"Clearly established law" is the focal point of inquiry, and the contours of the claimed constitutional entitlement must be "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The unlawfulness of the course of conduct "must be apparent" to the public official before qualified immunity will be denied. *Id.* In determining what is "reasonable," "[t]he court should ask whether the [public official] acted reasonably under the settled law in the circumstances, not

whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

Here, the decisions by the district court and the Ninth Circuit Court of Appeals cannot be reconciled with this Court's requirement that "unlawfulness must be apparent" for qualified immunity to be defeated. *Anderson*, 483 U.S. at 640. Arizona's statute made earned credit release fully discretionary with ADOC's Director, and no statutes in effect when Respondent committed his crime in 1988 required Respondent's good time credit release. Like the federal parole guidelines that this Court upheld in *Miller v. Florida*, 482 U.S. 423 (1987), ADOC's promulgation of a formal policy "merely rationalize[d] the exercise of statutory discretion, and that retrospective application of the guidelines thus does not violate the Ex Post Facto Clause." *Id.* at 434.

Further, prior to the district court's decision to deny qualified immunity, the identical Ex Post Facto challenge presented in this case was rejected by the Arizona Court of Appeals in *Sanchez*. In reaching the decision, the Arizona court considered the Ex Post Facto Clauses of both the United States and Arizona Constitutions. At the very least, it cannot be said, in light of the Arizona Court of Appeals decision, that any "unlawfulness" was "apparent." *Anderson*, 483 U.S. at 640. Indeed, how apparent can alleged unlawfulness be to ADOC's former Director when the Arizona Court of Appeals cannot find it? The Ninth Circuit's decision directly contradicts this Court's qualified immunity law and cannot be allowed to stand.

Furthermore, under applicable Ex Post Facto principles, it was not at all clear that a constitutional violation occurred here. Indeed, under the proper analysis, no Ex Post Facto violation has occurred.

The Constitution's Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). "After *Collins*, the focus of the Ex Post Facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's 'opportunity to take advantage of provisions for early release' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dep't Of Corrections v. Morales*, 115 S. Ct. 1597, 1602 n.3 (1995).

Yet this notion of reducing "opportunit[ies] to take advantage of provisions for early release," rejected by this Court in *Morales*, is exactly what the lower federal courts relied upon in finding that DMO 91-03 violated the Constitution's Ex Post Facto Clause. For example, the district court stated "[t]hat [Petitioner] was not *required* to release [Respondent] on his earned credit release date is immaterial: it is sufficient that [Respondent's] opportunity to shorten his time in prison was reduced by the statute in question." (App. C at 26; emphasis in original.)

DMO 91-03 neither altered the definition of the criminal conduct for which Respondent was in prison, nor increased the penalties attached to his crime or the sentence he was serving. Therefore, under this Court's decisions, Respondent stated no Ex Post Facto violation as a

result of ADOC's implementation of DMO 91-03. This Court should grant this petition and direct the lower courts to follow its Ex Post Facto precedent, and grant Petitioner qualified immunity.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

C. TIM DELANEY
Solicitor General

THOMAS J. DENNIS
Counsel of Record
GORDON S. BUELER
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-7683
Counsel for the Petitioners

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